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No.

In the Supreme Court of the United States

PAUL REVERE LIFE INS. CO. AND UNUMPROVIDENT CORP.,

Petitioners,

v.

GARY GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition involves a $2.4 million punitive award against petitioners in an insurance bad-faith case. Respondent submitted a disability claim to petitioner Paul Revere in December 1990. Paul Revere paid him benefits for over 8 years. However, after uncovering evidence that respondent lied in order to get the policy, fabricated a psychological ailment in order to leave an occupation in which he had overstayed his welcome, deliberately refrained from filing a claim until his policy's "contestability" period expired, and then attempted to sabotage every psychological exam that Paul Revere set up in an effort to determine whether he was in fact disabled — culminating in an independent medical examination that concluded that respondent was not disabled under the terms of the policy — Paul Revere terminated benefits payments.

The general question presented is whether the punitive award is unconstitutionally excessive. More specifically, this petition presents the following three questions that recur in punitive damages litigation: (a) whether the Ninth Circuit was correct in concluding that a 4.4:1 ratio of punitive to compensatory damages is "well within" "the outer limits of permissible disparities" notwithstanding this Court's statement that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)); (b) whether the Ninth Circuit's one-sentence assessment of the degree of reprehensibility of Paul Revere's conduct comports with the "exacting appellate review" required under *State Farm*; and (c) whether the Ninth Circuit was correct in comparing the punitive award to the "hundreds of millions of dollars" that Paul Revere would lose if its insurance license were suspended, notwithstanding this Court's rejection of that precise rationale in *State Farm*.

RULE 29.6 STATEMENT

Petitioner UnumProvident Corp. is a publicly held corporation; no other publicly held corporation owns 10% or more of its stock. Petitioner Paul Revere Life Insurance Co. is a wholly owned subsidiary of Paul Revere Corp., which is an indirectly wholly owned subsidiary of UnumProvident Corp.

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PETITION FOR A WRIT OF CERTIORARI

Paul Revere Life Insurance Co. and Unumprovident Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The original opinion (App., *infra*, 6a-10a) and amended opinion (App., *infra*, 1a-5a) of the Ninth Circuit are unreported. The order of the district court denying petitioners' post-trial motions (App., *infra*, 11a-20a) also is unreported.

JURISDICTION

The Ninth Circuit denied rehearing on March 4, 2004. App., *infra*, 21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

This Court no doubt intended its decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), to send a strong message to lower courts about the need to enforce the procedural and substantive limitations on punitive damages. Unfortunately, although courts by and large have paid heed to this Court's observation that punitive awards rarely should exceed a single-digit multiple of compensatory damages, few have taken to heart the Court's further pronouncements that the historical tradition of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1, 2:1, and 3:1) is "instructive" and that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum. This case is emblematic. Devoting a sin-

gle sentence to each of the three excessiveness guideposts identified by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Ninth Circuit upheld the $2.4 million punitive award against petitioners with the observation that "[t]he 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities." App., *infra*, 5a. Review is desperately needed to clarify that single-digit ratios are not immune from constitutional scrutiny and, indeed, that, when compensatory damages are substantial, a powerful justification is needed to sustain a ratio in excess of 1:1. This case also affords the Court the opportunity to correct continuing misapplications of the first and third guideposts. The relevant facts are as follows.

1. *Respondent purchases his policy, waits out the contestability period, and files his insurance claim.* Respondent Gary Greenberg purchased a disability policy from Paul Revere in November 1988, while working as a stockbroker. See ER087.[1] The policy included an "Own Occupation" rider (see ER090), which entitled him to receive benefits in the event he were to become "totally disabled" from performing the important duties of his own occupation — being a stockbroker. See ER595. Like most disability policies, Greenberg's policy provided for a two-year "contestable period," after which Paul Revere could no longer rescind the policy should it learn of inaccuracies in the application for that policy. See ER109, 608.

Fourteen months after purchasing the policy — and 10 months before the end of the contestability period — Paul Revere received a letter from Greenberg's attorney asserting that Greenberg was totally disabled and requesting that Paul Revere send claims forms. See ER116. As requested, Paul

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[1] All record citations are to the Excerpts of Record ("ER") filed in the Ninth Circuit.

Revere sent the forms, but Greenberg never completed or returned them. Instead, five months later Greenberg informed the company that he was dropping the claim. See ER117.

In December 1990 — six weeks after the end of the contestability period — Greenberg filed a claim, asserting that he was totally disabled from working as a stockbroker. He submitted a "Proof of Claim" form (ER118-123) and a letter from his treating psychologist, Dr. Francis Enos (ER124-126), attesting that Greenberg suffered from "Panic Disorder" and "Dysthymic Disorder" — a form of low-grade depression (see ER464) — which rendered him unable to function as a stockbroker. See ER126, 465.

2. *Paul Revere immediately begins paying, and concurrently commences investigating, the claim.* Shortly after filing the claim, Greenberg informed Paul Revere that, while he was no longer working as a stockbroker, he was working approximately 20-30 hours a week as an insurance salesman. See ER127, 134. Because of the obvious similarities between these two professions, Paul Revere decided to investigate Greenberg's claim further. See ER135.

Paul Revere commenced making disability payments to Greenberg as soon as he became eligible, in early 1991. In the meantime, it asked Jon Allen, a field agent in Arizona, to look into (a) "differences in jobs and how [Greenberg] is able to be a[n] insurance salesman but not a stockbroker," (b) the possibility of Greenberg's eventual return to being a stockbroker, and (c) the "exact details of disability." See ER136.

Allen met with Greenberg, obtained past medical, employment, and legal records, and talked to Dr. Enos. Allen's "Field Representative Report" (ER139-142) raised a number of significant red flags. In particular, Allen was "quite concerned in regards to possible prior manifestation concerning this particular claim. There are many things [in Greenberg's records] in regards to past medical history that we were not

aware of at the time this policy was issued." ER139. In addition, Allen reported that there were numerous undisclosed incidents on Greenberg's driving record and that Greenberg had been involved in a number of law-suits, none of which had been revealed in response to relevant questions on Greenberg's application. *Ibid.* Allen also expressed "some concern in regards to income" — that is, whether Greenberg had been making as much money in prior years as he claimed. *Ibid.* Finally, Allen expressed concern because "Mr. Greenberg originally filed this claim through his attorney and then did not follow through with it until after the two-year contestable period." ER142.

After receiving this report, Paul Revere retrieved copies of the pleadings in the lawsuits that Allen had discovered. Those records showed, among other things, that Greenberg had lied on his application for a job as a stockbroker with Dean Witter — claiming to be a college graduate when in fact he was not — which had led the NASD to bring an action against him that resulted in his license being suspended for 30 days and Dean Witter firing him (ER001-003, 009-058, 514); that Greenberg had also been fired from a job as a stockbroker at Smith Barney because a client had accused him of unauthorized trades (ER074, 525); and that in the 1980s he had resigned from yet another job as a stockbroker, at Rauscher Pierce, "from stress" (ER073).

Paul Revere also investigated Greenberg's new job selling insurance for MetLife to see how similar it was to his prior job as a stockbroker. See ER149-154. It learned that, although most of Greenberg's duties at MetLife involved selling insurance, he also sold securities. ER149. And when Paul Revere received Greenberg's application to work at MetLife (ER172-177), it learned that he had applied for the job several months before he stopped working as a stockbroker and filed his disability claim (see ER177, 597).

3. *The 1994 IME.* Although it is rare that psychiatric claims are permanently disabling (see ER594), Greenberg's doctors returned forms to Paul Revere in 1994 describing Greenberg's condition as basically unchanged. Paul Revere therefore decided to schedule an independent medical examination ("IME") to confirm Greenberg's diagnosis. As is frequently done with psychiatric IMEs (ER671), Paul Revere hired a psychologist to perform psychological testing (see ER187), and a psychiatrist to examine Greenberg thereafter, and to prepare a report based on the testing and interview (see ER185).

Greenberg objected to the first psychologist Paul Revere hired, calling him "unbalanced" based only on a phone call about scheduling the IME. See ER178. He threatened to kill himself if Paul Revere found him not to be disabled. See ER179. He tried to get Paul Revere to change psychologists a second time — after Paul Revere had done so once — claiming that the "mental status" of the second psychologist "[wa]sn't right" (ER183-184). And he rescheduled his examinations repeatedly. See ER180-182, 189.

Eventually, however, Greenberg met with Dr. Lorna Cheifetz for psychological testing, and then with Dr. Mariam Cohen for an interview. As Dr. Cheifetz reported (see ER190-198), Greenberg's behavior with her was bizarre. He claimed to be two hours late for the appointment, though he was in fact early (ER191); was distressed to have any contact with her because of the "bad vibe" he had from her (*ibid.*); and in general was "extremely dramatic, needy, expressed suicidal ideation, and a good deal of anger." *Ibid.* On the Rorschach Inkblot Test, Greenberg refused to look at more than two cards, and gave extremely negative responses to the two he did look at — describing one as showing a "man with a dark hood and eyes" or "body parts," the other as showing "dead animals," and both as "very evil and ominous." *Ibid.* He was equally uncooperative on the MMPI-II and MCMI2 tests. On the MMPI-II he took significantly more time than

normally allowed, "and despite [Dr. Cheifetz's] encouragement for him to not leave any blank, he omitted nineteen answers." ER192. He also left several items blank on his MCMI2. As Dr. Cheifetz explained, "[a]s a result, [both tests were] of very questionable validity." *Ibid.* She concluded that Greenberg's responses on the MMPI-II "suggest[ed] a propensity to exaggerate his symptomotology" (*ibid.*), and that "[t]he possibility of malingering could not be completely ruled out due to the fact that all test data showed a propensity to exaggerate the symptomotology" (ER197). She deferred formal diagnosis, however, to Dr. Cohen. *Ibid.*

After meeting with Greenberg, Dr. Cohen concluded that "his behavior in [the] interview was consistent with more than 'neurotic' levels of anxiety but approached psychotic proportions. * * * Taking all * * * factors into consideration suggests a possible diagnosis of Schizophrenia, Paranoid Disorder." ER203. Dr. Cohen added that, if her observations were accurate, "the treatment [Greenberg was] receiving [was] considerably inadequate" and that "[w]ithout effective psychopharmacological medication and considerable supportive psychotherapy," he likely "would be unemployable in any position." *Ibid.*

After reviewing these reports, Paul Revere decided to continue paying Greenberg's claim. ER460. It also forwarded the reports to Greenberg's treating psychologist and psychiatrist for their consideration. ER216-217.

4. *Paul Revere receives and investigates an allegation that Greenberg's claim was fraudulent.* On April 7, 1997, Paul Revere received an unsolicited phone call from David Goldfarb, an acquaintance of Greenberg's. See ER243-245, 605. Goldfarb accused Greenberg of outright fraud. According to Goldfarb, Greenberg had planned to "go on claim for panic attacks" when he initially purchased his policy. ER243. Goldfarb stated that Greenberg had explained the contestability period to him and had literally "mark[ed] the days off" on a pocket calendar until his policy's contesta-

bility period expired. See ER244. Goldfarb further indicated that, before Greenberg first went to see Dr. Enos, he had explained to Goldberg what he planned to say to ensure a diagnosis of panic disorder. Finally, Goldfarb reported that, prior to Greenberg's IME, Greenberg had studied material provided by one of his treating doctors "in order to appear psychotic" at that IME and had enlisted Goldfarb's son, Michael, to assist him in that preparation. See ER245.

Paul Revere referred Goldfarb's allegations to its fraud unit for review. See ER246, 606. Jim Prouty, who conducted the initial review, recommended that an investigator obtain a taped statement from Goldfarb and that the investigation focus on the "alleged manipulation of the IMEs." ER247. Jon Allen, the field agent in Arizona, then interviewed Goldfarb, arranged for surveillance of Greenberg,[2] reported the allegations to the state (which Paul Revere was legally obligated to do (see ER609-610)), and interviewed Goldfarb's lawyer Greg Davis, whom Goldfarb had indicated could confirm some of his allegations. See ER264-267, 281-286, 289-290, 611-612. Many of the details of Goldfarb's initial telephone call, and of his 14-page statement to Allen on August 6, 1997 (ER248-263), were consistent with information in the claim file. Among the consistencies were the following:

- An early sign of Greenberg's supposed disability was his claim to be experiencing heart palpitations — which Goldfarb knew about and stated were feigned (see ER254). See ER606-607.
- At Greenberg's 1994 IME he correctly spelled the word "world," but asserted that he was unable to spell it backwards — which Goldfarb knew about and said

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[2] The surveillance revealed that Greenberg had been doing well enough as an insurance salesman to receive his employer's "Agent of the Month" award during the time he was surveilled. ER270.

was a deliberate attempt to "pull[] the wool over [Dr. Cheifetz's] eyes" (ER260). See ER607.

- Goldfarb knew about Greenberg's bizarre responses on the Rorschach test. See page 5, *supra*; ER259, 607.
- Goldfarb confirmed Greenberg's history of illicit drug use and his lies about it on his insurance application. See ER253, 607-609.
- Goldfarb knew about Greenberg's falsification of his educational background in connection with his application for a securities license, that Greenberg's license had been temporarily suspended as a result, and that there had been several complaints raised against Greenberg for engaging in securities trades without his clients' permission. See ER243, 252, 607.
- Goldfarb knew that Greenberg had filed his claim just after expiration of the contestability period and said that the timing was a deliberate effort to preclude Paul Revere from "spoil[ing Greenberg's] plans" by canceling the policy because of the misstatements on the application. See ER253-254, 608-609.[3]

Paul Revere also discovered during its investigation that there were serious questions about Goldfarb's credibility. For example, the Arizona Securities Division told Paul Revere that it had an ongoing investigation of Goldfarb for defrauding various investors (including Greenberg). Because of this credibility concern, Prouty stressed that Goldfarb's allegations "should be independently verified by other sources" before Paul Revere relied on them. See ER290.

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[3] At trial Michael Goldfarb, David Goldfarb's son, and Greg Davis, his lawyer, corroborated certain of Goldfarb's key allegations — namely, that Greenberg used Goldfarb and his children to "practice" for psychological testing and that Greenberg was manipulating his treating physician. ER289-290, 617, 621-629.

5. *The 1988 IME.* In view of the questions that had been raised in the prior IME, the failure of Greenberg's doctors to note any improvement in his condition, Goldfarb's tip, and Prouty's recommendation that it seek independent confirmation of Goldfarb's allegations, Paul Revere decided to arrange for a new IME. See ER291, 659-661.

Larry Iannetti, an in-house psychiatric consultant, chose forensic psychiatrist Steven Pitt to perform the IME on the basis of a recommendation of a colleague who had used Dr. Pitt in a prior matter. Ianetti selected Pitt because he found the report Pitt prepared in the other matter — in which he determined that the claimant was disabled — to be "very thorough, very detailed." ER661-662.

Iannetti sent Pitt a packet of material from the claim file — including the policy, the claim form, all medical files, the previous IME reports, and all correspondence with Greenberg's treating doctors — to familiarize him with Greenberg's case. ER310-314, 662-665. In total, Iannetti provided Pitt with a three- to four-inch-thick stack of documents. ER680-681. Iannetti chose not to include Goldfarb's 14-page statement to Pitt in that initial packet, so as to minimize any possible prejudice or bias before Pitt's interview. ER666-668. The package did, however, include a two-page phone log of Goldfarb's initial telephone call. ER677-679.

As part of his examination, Pitt arranged for Greenberg again to be administered an MMPI-II, this time by Dr. David Biegen. As with Dr. Cheifetz's MMPI-II several years before, this test proved basically useless. Biegen reported to Pitt that "[t]he client has responded to the MMPI-2 items in an extremely exaggerated manner, endorsing a wide variety of rare symptoms and attitudes" and that "[t]he resulting MMPI-2 clinical profile is not a valid indication of the individual's personality and symptoms." ER342.

After Greenberg took the MMPI-II, Pitt met with him for a 4¼-hour videotaped interview. See ER709. Soon thereafter, Pitt called Iannetti and "reported that the insured exhib-

ited many inconsistent behaviors during the examination, particularly indicative of malingering." ER299. Pitt suggested that further neuropsychological testing might be in order, to see whether this was truly the case. *Ibid.* At this point, Iannetti explained Goldfarb's allegations to Pitt and agreed to fax him the transcript of Goldfarb's interview (*ibid.*); Iannetti decided to defer consideration of further testing until Pitt finalized his report. *Ibid.*

Pitt's 50-page IME report concluded that Greenberg was almost certainly malingering and not totally disabled. See ER354-355, 712.[4] Based on some lingering questions, however, Pitt again suggested that Paul Revere have Greenberg undergo additional testing. ER300-301, 670-671. Although this was outside the normal course of an IME (ER671-672), Paul Revere authorized neuropsychological testing and accepted Pitt's recommendation that Dr. Pamela Willson, a leading neuropsychologist, perform those tests. ER672, 711.

Willson tested Greenberg and submitted a 10-page report, which concluded that there was "a high likelihood of malingered or factitious presentation on the cognitive tests that were administered." ER367. Indeed, on some of the IQ tests, this stockbroker/insurance salesman scored borderline retarded, "defective," and "flatly defective"; on another he managed to obtain the score of an average eight-year-old; and on still another he scored "well below chance," indicating that "he might have been attempting to throw the test." ER363-364, 684.[5] Based on this additional testing and his

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[4] Pitt also explained that he was "troubled by the apparent lack of consideration given [by Greenberg's treating physicians] to the possibility that the claimant may, in fact, be intentionally producing false or grossly exaggerated physical and psychological symptoms for the purpose of secondary gain," because there had been no significant signs of improvement over eight years. ER352.

[5] Willson also readministered the MMPI-II. Once again Greenberg was uncooperative, causing Willson to need to prod him to answer as many as 10% of the questions. According to Willson, Greenberg made "a great

own earlier observations, Pitt issued his final report. His conclusion was unequivocal: "It is * * * my opinion, to a reasonable degree of medical certainty, that Gary L. Greenberg is not totally disabled because of injury or sickness that prevents him from being able to perform the important duties of his occupation." ER371.

6. *The termination of benefits and ensuing lawsuit.* Based on Pitt's IME, Paul Revere concluded that Greenberg was not totally disabled under the terms of his policy. ER372. It informed Greenberg of this conclusion by letter dated September 29, 1998. ER374-376. However, Paul Revere provided Greenberg's then-treating physician, Dr. Henri Moyal, with a copy of the IME reports as a courtesy (ER676) and offered both Moyal and Greenberg an opportunity to provide further information to support the reinstatement of benefits. Neither did so. See ER512-513, 615. In fact, Moyal was specifically instructed by Greenberg's lawyer not to respond. ER512-513. Instead, Greenberg sued, alleging breach of the covenant of good faith and fair dealing. The principal gist of his claim — and the only conduct identified by the district court in support of the verdict — was that Paul Revere acted improperly by supplying Pitt with Goldfarb's allegations without also informing him that Goldfarb's credibility was subject to question.

The jury found for Greenberg and awarded him $151,552.42 in past benefits, $395,893 in future benefits, and $2.4 million in punitive damages. The district court denied petitioners' post-trial motions, including their contention that the punitive damages were unconstitutionally excessive (App., *infra*, 11a, 17a-19a), and then awarded attorneys' fees and costs of $299,785.17 under Arizona law.

7. *The decision below.* Paul Revere raised several issues on appeal, including the failure of the district court to

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many unusual responses, which typically reflect a degree of overstatement or exaggeration, but may also reflect genuine disturbance." ER366.

screen the testimony of Greenberg's bad-faith expert for reliability, the sufficiency of the evidence to support the finding of liability for punitive damages, and excessiveness of the punitive damages. The Ninth Circuit affirmed in all respects, holding, among other things, that expert testimony based on experience need not be screened for reliability (App., *infra*, 7a) and that the punitive award was not unconstitutionally excessive (*id.* at 10a). On the latter point, the court devoted one sentence to each of the three *BMW* guideposts. Citing no evidence in the record, the Ninth Circuit said with respect to the first guidepost that "[t]he evidence of Paul Revere's repeated conduct, which included acts of deceit, [sic] towards a financially vulnerable plaintiff was sufficient to allow the jury to find such behavior reprehensible." *Ibid.* As to the second guidepost, it opined: "The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities." *Ibid.* And, ignoring Arizona's $5,000 statutory fine for unfair claims settlement practices, the court found the third guidepost to present no impediment to upholding the punishment. The court explained: "Considering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere, we conclude that the $2.4 million punitive award was not unconstitutionally excessive." *Ibid.*

Paul Revere petitioned for rehearing on two grounds. First, it pointed out that the court's holding that the testimony of a bad-faith expert need not be screened for reliability was flatly inconsistent with *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and subsequent Ninth Circuit case law. Second, it contended that the holding that the punitive award was not excessive was inconsistent with this Court's pronouncements in *State Farm* about each of the three *BMW* guideposts. The Ninth Circuit dispensed with the expert-

testimony issue by baldly asserting that, even if the testimony should have been screened for reliability, it was duplicative of other testimony, making its admission harmless. App., *infra*, 2a. The court left its discussion of excessiveness unchanged. It then immediately issued its mandate, effectively precluding a second rehearing petition on the new cert.-proof rationale for its rejection of the expert-testimony argument.

REASONS FOR GRANTING THE PETITION

In *State Farm*, this Court expressed "concerns over the imprecise manner in which punitive damages systems are administered," reiterated its admonition that "punitive damages pose an acute danger of arbitrary deprivation of property," and made clear that reviewing courts must undertake "[e]xacting appellate review" in order to ensure that punitive awards are "based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 417-418 (internal quotation marks and alterations omitted). More substantively, it admonished that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419. Moreover, it explained, even when some amount of punitive damages is warranted after consideration of the degree of the defendant's culpability and the amount of the compensatory damages, the punishment must go "no further" than necessary to satisfy the state's legitimate interests in punishment and deterrence and must be "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 420, 426. Beyond these general pronouncements, the Court provided concrete guidance as to the proper application of each of the three *BMW* guideposts.

Regrettably, whether out of defiance or confusion, lower courts have been routinely misapplying (and, in some instances, outright ignoring) the guidance provided in *State Farm*. The current case is illustrative. In its perfunctory

treatment of the excessiveness issue — one sentence per guidepost — the Ninth Circuit managed to misapply each of those guideposts. Because the errors exemplified by the Ninth Circuit's opinion are by no means unique, review is necessary to close up the loopholes that the Ninth Circuit and other lower courts have been punching in *State Farm*.

A. The Lower Courts Are Systematically Misapplying The Ratio Guidepost.

In *State Farm*, this Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added).

Applying these guidelines to the facts of the case before it, the Court observed that the $1 million compensatory award for emotional distress sustained by the plaintiffs for the year and a half that State Farm left them subject to an "excess verdict" was "substantial" and constituted "complete compensation." *Id.* at 426. The Court further noted that those damages embodied a punitive component. *Ibid.* For these reasons, it concluded that, even though the defendant's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-420), "a punitive award at or near the amount of com-

pensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

In the aftermath of *State Farm*, most lower courts have taken to heart the Court's admonition that double-digit (or higher) ratios will rarely be constitutional. At the same time, however, many courts have assumed that single-digit ratios are immune from constitutional scrutiny, ignoring both this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive" and its admonition that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum.

The present case is illustrative. The Ninth Circuit breezed through the ratio analysis with the observation that the 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities." App., *infra*, 5a. Despite the fact that the jury awarded Greenberg all unpaid benefits *plus* the present value of total disability benefits for the balance of the life of his policy, and that the district court then added another $300,000 in attorneys' fees and costs, the Ninth Circuit made no mention of *State Farm*'s clearly pertinent admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.[6]

This is not the only occasion on which the Ninth Circuit has been unfaithful to the guidance this Court supplied in *State Farm*. In a case alleging employment discrimination on the basis of ethnicity and national origin, that court upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d

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[6] There can be no question that the awards of future benefits (which might never be owed) and attorneys' fees will have a substantial deterrent effect. See *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").

1020 (9th Cir. 2003), cert. denied, 124 S. Ct. 1602 (2004). Focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit stated: "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044.

Nor is the Ninth Circuit alone in failing to pay full heed to the guidance this Court provided in *State Farm*. For example, in one of the first post-*State Farm* decisions, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), cert. dism'd, 124 S. Ct. 1168 (2004). Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

And in a case that this Court vacated and remanded for further consideration in light of *State Farm*, the Federal Circuit held that *State Farm* did not require it to reduce a $50 million punitive award that was more than three times the compensatory damages the court regarded to have arisen out of the business tort committed by the defendant. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is so necessary. Focusing

entirely on this Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of *more than 4:1 may be close to the line — and ignoring en*tirely the Court's observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in the case before it) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

345 F.3d at 1372 (alterations in original; citation omitted).

More recently, the Utah Supreme Court — in the *State Farm* remand itself — came up with a new way to evade this Court's guidance on the ratio guidepost. Rather than ignoring entirely this Court's suggestion that a ratio of 1:1 might be the constitutional maximum in that case, the Utah court instead opted to engage in revisionist history, claiming that what this Court really meant in *State Farm* is that "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188, at *9 (Utah Apr. 23, 2004). Because the Campbells' damages were emotional rather than economic, the court reasoned, a ratio in the upper single-digit range, rather than the 1:1 ratio suggested by this Court, was justified. *Id.* at *9-10.

In short, whether by rewriting this Court's discussion of the ratio guidepost or by engaging in a selective reading of it,

the lower courts have pretty much read out of the opinion the suggestion that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial. Indeed, of the *more than 30* post-*State Farm* cases available in electronic databases in which compensatory awards (or potential harm) have exceeded $200,000, in only one has a reviewing court construed *State Farm*'s ratio analysis to necessitate a reduction to roughly a 1:1 ratio. See *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003). In that case, the trial court observed that "the Supreme Court's instructions on [the ratio] point still appear somewhat imprecise" and characterized the guidance given by the Court on ratios as "still formative." *Id.* at 449-450. Nevertheless, unlike the Ninth Circuit, the *TVT* court found "[m]ost compelling" this Court's "instructions concerning the relative size of the compensatory damages verdict." *Id.* at 450. Concluding that the nearly $24 million in compensatory damages was both "substantial" and "complete compensation" for the plaintiff's injury, the court held that "any punitive recovery beyond [the amount of the compensatory damages] would be more than necessary to achieve the level of retribution and deterrence appropriate to this case * * *." *Id.* at 450-451.

Aside from *TVT*, we have located no case in the electronic databases in which a court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below. To the contrary, the overwhelming majority of courts have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1106 (D. Alaska 2004) (focusing exclusively on Court's reference to single-digit multipliers in reducing $5 billion punitive award to $4.5 billion, where injury to plaintiffs was deemed by court to be $513,147,740); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361, 363 (Ark.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, and holding that a 4.2:1 ratio was constitutionally "reasonable" where compensatory damages were $5 million), cert. denied, 124 S.

Ct. 535 (2003); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App. 2004) (stating that "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'" and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million), review granted, 88 P.3d 497 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674-76 (Or. Ct. App.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. Ct. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm*'s statement on single-digit ratios, where compensatory damages were $300,000); *Harris v. Archer*, 2004 WL 178398, at *19-20, *29 (Tex. Ct. App. Jan. 29, 2004, pet. filed) (focusing exclusively on Court's references to single-digit and 4:1 ratios and reducing 7.4:1 ratio to 4:1, despite concluding that "lesser ratio" was warranted, where aggregate compensatory damages were $203,895); *Haggar Clothing Co. v. Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (stating that "a multiplier of 9 or less means that the punitive damages presumptively passes [sic] muster under the Due Process Clause" and concluding that $1 million punitive award that

was twice the plaintiff's compensatory damages "easily meets the new ratio test").[7]

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[7] See also, *e.g.*, *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 725287, at *18 (N.D. Ill. Apr. 1, 2004) (concluding that approximately 3.4:1 ratio was "well within the constitutional guidelines set forth by the Court" where compensatory damages were $8.3 million); *S. Union Co. v. S.W. Gas Corp.*, 281 F. Supp. 2d 1090, 1099-1105 (D. Ariz. 2003) (concluding that 154:1 ratio did not render punitive award unconstitutionally excessive in light of court's belief that $390,073 compensatory award understated damage done by defendant public official to the public trust); *Eden Elec., Ltd. v. Amana Co., L.P.*, 258 F. Supp. 2d 958, 972-75 (N.D. Iowa 2003) (reducing 8.5:1 ratio to approximately 4.76:1 in business tort case in which plaintiff received "a substantial compensatory damages award" of $2.1 million), aff'd, 2004 WL 1175783 (8th Cir. May 28, 2004); *Planned Parenthood v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055, 1062-64 (D. Or. 2004) (invoking *State Farm*'s exception for "a particularly egregious act [that] has resulted in only a small amount of economic damages" or a case in which "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine" in holding that aggregate ratio of 206.1:1 satisfied due process where joint and several compensatory damages were $526,336.14); *Union Pac. R.R. v. Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004) (citing *State Farm*'s statement that single-digit ratios are more likely to comply with due process in concluding that 5:1 ratio was justified, where compensatory damages were $5.1 million); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (finding 4.3:1 ratio of punitive damages to $400,000 in non-compensable benefit-of-the-bargain damages not to be indicative of excessiveness because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of constitutional impropriety,' but not presumptively unconstitutional"), review granted, 86 P.3d 881 (Cal. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (deeming a 3:1 ratio to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensa-

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm*, 538 U.S. at 425), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But the near universal focus of the lower courts on the Court's references to single-digit and 4:1 ratios — and near universal disregard of its statement that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial — is much harder to comprehend. As the district court observed in *TVT*, the guidance provided in *State Farm* is "still formative." 279 F. Supp. 2d at 450. Further guidance is plainly needed both to clarify that, in admonishing that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial, the Court meant what it said, and to assist lower courts in identifying circumstances under which a departure from that benchmark is permissible.

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tory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Gallegos v. Elite Model Mgmt. Corp.*, 2004 WL 51604, at *5 (N.Y. Sup. Ct. Jan. 6, 2004) (perfunctorily concluding that 2.4:1 ratio of punitive damages to $1.1 million award for pain and suffering "fully satisfied due process"); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (acknowledging that 10:1 ratio exceeded *State Farm*'s single-digit presumptive ceiling for due process, but concluding that ratio passed constitutional muster in light of defendant's reprehensible conduct, its significant wealth, and the "limited" $278,825 compensatory award); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 877 (S.C. Ct. App. 2004) (focusing exclusively on Court's references to single-digit and 4:1 ratios in concluding that aggregate ratio of 2.5:1 "comport[ed] with due process" where aggregate compensatory damages were over $1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis.) (implicitly concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, 124 S. Ct. 925 (2003); cf. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1075 (Utah 2003) (deeming federal excessiveness issue waived, but nonetheless upholding $5.5 million punitive award that was 5.5 times the compensatory damages as being "well within the single-digit ratio discussed by the Supreme Court in" *State Farm*), cert. denied, 124 S. Ct. 1716 (2004).

B. The Lower Courts Are Systematically Misapplying The Reprehensibility Guidepost.

The present case also is an ideal vehicle for addressing a second critical issue that has confounded the lower courts — how the requirement of *de novo* appellate review applies to the determination of the degree of reprehensibility of the defendant's conduct. This is a threshold question that arises in every case in which a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the reviewing court's excessiveness review. Accordingly, it is critical that the Court resolve the issue once and for all.

1. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts. The Court reiterated that mandate in *State Farm*, observing that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 418 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct.

In the absence of guidance from this Court, most reviewing courts have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility — rather than independently gauging the degree of reprehensibility of the defendant's conduct.

The decision below is emblematic of this deferential approach. The totality of the Ninth Circuit's reprehensibility analysis consists of its statement that "[t]he evidence of Paul Revere's repeated conduct, which included acts of deceit, [sic] towards a financially vulnerable plaintiff *was sufficient to allow the jury to find* such behavior reprehensible" (App., *infra*, 5a (emphasis added)). The court made no effort to determine for itself whether there was any repeated conduct or acts of deceit, much less whether the *degree* of reprehensibility of Paul Revere's conduct was sufficiently high to justify a punishment well above the one this Court suggested was the constitutional maximum in *State Farm*.

The Ninth Circuit's refusal to engage in exacting scrutiny of the underlying facts and degree of reprehensibility of the punishable conduct is far from unique. See, *e.g.*, *Bogle*, 332 F.3d at 1361 ("*A reasonable jury could have concluded from the evidence* that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race * * *.") (emphasis added); *Romo*, 6 Cal. Rptr. 3d at 806 & n.8 (rejecting argument that *State Farm* requires a court "either to reevaluate the evidence or to accept only 'the core facts of the case that the jury had to find in order to return a punitive damage verdict against the defendant'" and concluding that "*[s]ubstantial evidence supports the jury's implicit conclusion* that Ford acted with malicious conduct under aggravated circumstances") (emphasis deleted and added); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761 ("[W]e are compelled to observe that a jury did, in fact, determine Argonaut's conduct to be fraudulent and reprehensible and deserving of significant punitive damages. Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury * * *."); *Waddill v. Anchor*

Hocking, Inc., 78 P.3d 570, 574 (Or. Ct. App. 2003) ("[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and that, as a result, *we must resolve all disputed facts in favor of plaintiff*.") (emphasis added).

2. The near universal tendency among courts to assume that the jury has found the defendant's conduct to be highly reprehensible and then to defer to presumed subordinate factual findings is impossible to square with this Court's precedents. In *BMW*, for example, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 565 (quoting ALA. CODE § 6-11-20). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensibility of the defendant's conduct, concluding that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The Court emphasized that the jury's finding of the conduct necessary for punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-580.

In *Cooper Industries*, the Court expressly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "*specific* findings of fact" by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, re-

viewing courts must decide for themselves whether the aggravating factors characteristic of highly reprehensible conduct are present. And in *State Farm*, the Court reiterated the importance of "[e]xacting appellate review" (538 U.S. at 418), giving no indication that this critical constitutional requirement can be satisfied by application of a sufficiency-of-the-evidence type standard.

3. To the contrary, absent specific factual findings that can be reviewed deferentially, a sufficiency-of-the-evidence standard is inconsistent both with the law/fact distinction the Court drew in *Cooper Industries* and with the procedural due process concerns it expressed in *State Farm*. That is because neither a jury's finding of the conduct necessary for punitive liability nor the amount of punitive damages the jury elects to impose supplies any indication of its assessment of the *degree* of reprehensibility of the defendant's conduct. Indeed, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Upon reaching the punishment-setting stage, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish. In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may

have been found, application of a sufficiency-of-the-evidence standard (as both reviewing courts did here (see App., *infra*, 5a, 17a-19a) would result in deference being given to what are in reality phantom factual determinations, which in turn results in "false positive" determinations of high reprehensibility. This concern is more than hypothetical. In most cases in which a large punitive award is imposed against a wealthy company, the plaintiff's counsel argues both that the conduct was egregious and that the punitive damages must be significant in relation to the defendant's net worth (or some similar measure of wealth) in order to accomplish the deterrent function. It is impossible to tell from the mere fact that the jury returned a multi-million dollar punitive verdict whether the jury actually accepted any of the inferences urged on it by the plaintiff's counsel or instead believed that, in view of the substantiality of the defendant's financial resources, a multimillion dollar award constituted modest punishment for conduct of modest reprehensibility.

4. The difference between deferring to a jury's finding of punitive liability and conducting a true *de novo* review of the degree of reprehensibility of the defendant's conduct is readily apparent in this case. Any court undertaking a searching review of the evidence would have to conclude that Paul Revere's conduct did not come anywhere close to the level of reprehensibility necessary to support a $2.4 million punitive award (twenty percent higher than the amount this Court deemed in *BMW* to be "tantamount to a severe criminal penalty" (517 U.S. at 585)).

The record in this case reveals beyond a shadow of a doubt that (i) Paul Revere paid Greenberg's claim in good faith for over eight years (a total of $317,000) and (ii) whether out of paranoia or an intent to defraud, Greenberg set upon a course of sabotaging every psychological examination Paul Revere arranged for him in its contractually authorized effort to determine whether he was truly suffering

from a disabling condition. As a result of his own actions, he succeeded in throwing up enough smoke to cause no less than four independent experts (Drs. Cheifetz, Cohen, Willson, and Pitt) to conclude that he either was malingering or was suffering from a psychosis that was far more serious than the condition for which he was being treated and that would be entirely inconsistent with his ability to drive safely and play basketball, not to mention to sell insurance well enough to win an Agent of the Month award. Whether or not it was "bad faith" for Paul Revere to terminate benefits in reliance on these expert conclusions and whether or not the decision to terminate benefits was sufficiently egregious to support a finding of punitive liability, neither Greenberg, nor the district court, nor the Ninth Circuit has ever pointed to evidence that would warrant the conclusion that Paul Revere's "culpability, after having paid compensatory damages [and attorneys' fees]," was so substantial "as to warrant the imposition of further sanctions to achieve punishment or deterrence" (*State Farm*, 538 U.S. at 419). *A fortiori*, the evidence fell far short of establishing that Paul Revere's conduct was "sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585).

To the contrary, had the Ninth Circuit conducted the exacting review required by *State Farm*, it would have had to conclude that Paul Revere's conduct was materially less reprehensible than the conduct involved in *State Farm* — a case in which this Court strongly suggested that the punitive award should not exceed the amount of compensatory damages. According to the findings of the lower courts, State Farm affirmatively deceived its insured (a financially vulnerable senior citizen) into believing that he had no risk of liability to the third-party claimants who had sued him for injuries arising out of an auto accident, ignored the advice of one of its investigators to settle the claims, and ordered the claim adjuster to alter the file to make the insured appear to

be less culpable than the investigation actually reflected. 538 U.S. at 413, 419. Here, in contrast, there was no evidence that Paul Revere lied to Greenberg, altered the claim file, or ignored the recommendations of its own claims personnel.

The Ninth Circuit believed that there was evidence that three of the aggravating factors identified in *State Farm* were present here (vulnerable victim, repeated conduct, and deceit). That belief (which, in any event does not distinguish this case from *State Farm*) is simply wrong. The record contains no evidence that the termination of Greenberg's claim was part of a pattern of repeated bad-faith claim denials. Insofar as the Ninth Circuit meant that the handling of Greenberg's claim itself involved "repeated conduct" (App., *infra*, 5a) that would be a serious misapplication of this factor. This Court plainly had in mind conduct that affected multiple victims, not a discrete claim determination that can be atomized by a creative plaintiff's lawyer into several acts. Indeed, any other conclusion would render this factor present in every case. The Ninth Circuit's statement that the conduct involved "deceit" (*ibid.*) similarly stretches that factor beyond usefulness. Greenberg could be said to have been "deceived" only insofar as any claim decision that purports to be legitimate but instead is found to have been made in bad faith is "deceptive."[8] But if that is all that is required for this factor to come into play, it is difficult to imagine any case involving an economic tort in which it would not apply.

In short, as this case well demonstrates, the difference between sufficiency-of-the-evidence review and exacting review can be the difference between upholding a multi-million dollar punishment and concluding that "a more modest punishment * * * could have satisfied the State's legitimate ob-

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[8] To the extent the Ninth Circuit had in mind Paul Revere's alleged failure to inform Pitt that Goldfarb's credibility was subject to question, it overlooked Pitt's uncontradicted testimony that he was aware that Goldfarb might have an ulterior motive from the materials that Ianetti had provided him (ER354, 710), and hence was not "deceived" at all.

jectives" (*State Farm*, 538 U.S. at 419-420). Because the Ninth Circuit regrettably is not alone in diluting the constitutionally mandated exacting review by engaging in unwarranted deference to phantom factual findings, review is warranted to clarify that, in the absence of specific jury findings, reviewing courts must determine for themselves whether the evidence establishes the existence of aggravating factors indicative of high reprehensibility.

C. The Lower Courts Are Continuing To Either Misapply Or Give Short Shrift To The Third Guidepost.

In *State Farm*, this Court admonished lower courts to compare the punitive damages with the legislatively established fine (if any) that is *realistic* under the circumstances, not to dwell on "the remote possibility of a criminal sanction" or to "speculate[]" about penalties, such as suspension of a business license, that are unrealistic under the facts of the case. 538 U.S. at 428. In so doing, the Court no doubt intended to lay to rest the kind of result-oriented application of the third guidepost that the Utah Supreme Court had perpetrated in that case. Unfortunately, that objective has not been accomplished. Courts bent on upholding multi-million dollar punitive awards continue to ignore or misapply this guidepost as if *State Farm* had never been decided.

For example, in the present case, the Ninth Circuit used *precisely* the same rationale that this Court rejected in *State Farm*. Ignoring that Greenberg's punitive award is 480 times the maximum civil fine for violating Arizona's proscription against unfair claims settlement practices, the court held that the $2.4 million punishment does not run afoul of the third guidepost because the "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere" (App., *infra*, 5a).

The Utah Supreme Court has taken a different tack in the *State Farm* remand. Latching on to the fact that this Court

appears to have "endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine" established by the Utah legislature for violations of Utah's Unfair Claims Practices Act, the court reasoned that a 100:1 ratio "does not offend due process." *Campbell*, 2004 WL 869188, at *10. It then leaped to the conclusion that a ratio of 902:1 would also comport with due process. *Ibid.* ("[W]e hold fast to our conviction that a punitive damages award of $9,018,780.75 is in line with the third *Gore* guidepost."). That bit of logical legerdemain not only drains the third guidepost of any constraining force, but also is affirmatively inconsistent with *BMW*, in which the Court concluded that a disparity of 1,000:1 was an indication that the punitive award at issue was grossly excessive. See 517 U.S. at 584.

Many other courts have refused to give weight to the third guidepost, even when, as in the case of insurance bad faith, there is a readily available civil fine with which to compare the punitive award. See, *e.g.*, *In re Exxon Valdez*, 296 F. Supp. 2d at 1107-1109 (upholding $4.5 *billion* in punitive damages notwithstanding fact that maximum civil penalty was $63.8 million and federal criminal fine (including restitution) paid by Exxon was $125 million); *Hollock*, 842 A.2d at 422 ($2.8 million punitive award was not "unjustified" in light of "potentially harsh penalties" that could be imposed on insurer for unfair claims handling — $5,000 per-violation fine and suspension of its license); *Trinity Evangelical*, 661 N.W.2d at 803 (refusing to give weight to Wisconsin's $10,000 penalty for unfair insurance claim settlement practices on ground that this Court had indicated in *State Farm* that criminal penalties have "less utility").

Review is badly needed to correct — once and for all — the pervasive refusal among the lower courts to apply the third guidepost in a principled fashion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2004

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

GARY GREENBERG, husband, *Plaintiff-Appellee*,

v.

PAUL REVERE LIFE INSURANCE COMPANY, a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc., *Defendants-Appellants*.

No. 02-16501

Argued and Submitted Oct. 9, 2003.
Decided Jan. 12, 2004.

As Amended on Denial of Rehearing and Rehearing En Banc March 4, 2004.

Before PREGERSON, BEAM,* and PAEZ, Circuit Judges.

MEMORANDUM**

Defendants, Paul Revere Life Insurance Company and its corporate affiliates (collectively, "Paul Revere"), appeal from the district court's judgment following a jury verdict in favor of Plaintiff Gary Greenberg's ("Greenberg") claim of bad faith termination of disability benefits. Paul Revere argues that the district court committed various evidentiary errors, misinterpreted the type of damages available under Arizona law, and allowed an impermissible award of punitive dam-

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

ages. We have jurisdiction under 28 U.S.C. § 1291 and affirm the judgment.

I. The district court's evidentiary rulings.

Paul Revere contends that the district court committed reversible error when it (a) admitted the testimony of Greenberg's insurance industry expert, (b) excluded Paul Revere's expert testimony about Greenberg's demeanor during a deposition, and (c) excluded Paul Revere's evidence of Greenberg's website postings. We review evidentiary rulings for an abuse of discretion. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir.2002).

First, the district court did not abuse its discretion in admitting the testimony of Greenberg's industry expert, Donald Kelley. Contrary to Paul Revere's contention, the district court was not required to assess Kelley's testimony against the factors articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) — peer review, publication, error rates, etc. — where it was the "kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir.2000). Even assuming that the district court erred in allowing Kelley to testify, we cannot reverse absent some showing of prejudice. See *Janes*, 279 F.3d at 886. Here, Paul Revere was not prejudiced because much of Kelley's testimony about the industry standards for the proper handling of disability claims was corroborated by one of Paul Revere's lead claim examiners on the witness stand. Thus, the decision to admit Kelley's testimony ultimately was not prejudicial.

Second, the district court properly barred Dr. Steven Pitt from testifying about his impressions of Greenberg's demeanor during a deposition because Paul Revere failed to

disclose this additional testimony until the eve of trial.[1] Moreover, Paul Revere is unpersuasive in invoking the "treating physician" exemption because Dr. Pitt's observations at the deposition were clearly outside of a "treatment" context.

Third, the district court properly excluded Paul Revere's evidence of Greenberg's website postings as irrelevant. In any event, Paul Revere waived its objection when it failed to later request an evidentiary hearing after earlier being invited to do so by the district court.

None of these evidentiary rulings constitute reversible error.

II. The availability of "future benefits" under Arizona tort law.

Paul Revere challenges the district court's decision to allow future benefits as part of an award for a bad faith termination of benefits under Arizona law. We review *de novo* a district court's interpretation of state law. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir.2002) (en banc).

Although the Arizona Supreme Court has not addressed this issue directly, the district court correctly noted that Arizona law contains a general presumption in favor of future damages. See *Wendelken v. Superior Court*, 137 Ariz. 455, 671 P.2d 896, 899 (1983) ("Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity."). Other states

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[1] Paul Revere's attempt to categorize Dr. Pitt as a layperson runs afoul of a 2000 amendment to Federal Rule of Evidence 701, which "ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson." Fed.R.Evid. 701 advisory committee's notes.

have found that an award of future damages is consistent with the general tort requirement of "direct and proximate" causation where there is evidence that (1) the insured will continue to be "entitled" to disability benefits,[2] and (2) the insurer will continue to deny those benefits.[3] Thus, were the Arizona Supreme Court to address this issue, it would likely hold that future policy benefits may be awarded as compensatory damages.

Here, Greenberg presented considerable evidence that his condition was likely permanent and would qualify him for disability benefits into the future. The record also suggests that the jury believed that Paul Revere had irrevocably strained its relationship with Greenberg and had basically repudiated the contract.[4] In light of all the evidence and the availability of future policy benefits under Arizona law, the district court did not err in allowing the jury to include such benefits as part of its award of compensatory damages.

III. Availability of punitive damages.

We review Paul Revere's challenge to the sufficiency of evidence supporting the punitive damages award under the "substantial evidence" standard. See *Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir.2002). Here, Green-

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[2] See, *e.g.*, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, 149 n. 7 (1979) (en banc) (allowing future policy benefits as part of compensatory damages if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated).

[3] See *e.g.*, *DeChant v. Monarch Life Ins. Co.*, 204 Wis.2d 137, 554 N.W.2d 225, 229 (Ct.App.1996) (holding that future benefits are available upon a finding of bad faith because "repudiation is a legal conclusion which the trial court reaches after the fact finder makes its determinations about whether there was a breach and whether the breach was in bad faith").

[4] The jury's decision to award future damages to Greenberg rather than allow Paul Revere to reinstate the policy suggests that the jury believed that Paul Revere would find another way to deny benefits to Greenberg.

berg proffered ample evidence that Paul Revere acted with the "evil mind" necessary to support a punitive award under Arizona law. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 679-80 (1986).

IV. Excessiveness of punitive damages.

We review de novo Paul Revere's claim that the punitive damages award of $2.4 million was unconstitutionally excessive. *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir.2001). Applying the three factors identified in *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996) — the degree of reprehensibility, the ratio between compensatory and punitive damages, and the availability of civil penalties for comparable misconduct — we find that the punitive award was not excessive.

The evidence of Paul Revere's repeated conduct, which included acts of deceit, towards a financially vulnerable plaintiff was sufficient to allow the jury to find such behavior reprehensible. See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003); *BMW*, 116 S.Ct. at 1599, 116 S.Ct. 1589. The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the "single digit ratio" that marks the outer limits of permissible disparities. *State Farm*, 123 S.Ct. at 1524. Considering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere, we conclude that the $2.4 million punitive award was not unconstitutionally excessive.[5]

AFFIRMED.

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[5] The district court also found that the punitive award in this case was within the range of other jury verdicts in similar bad faith cases in Arizona.

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

GARY GREENBERG, husband, *Plaintiff-Appellee*,

v.

PAUL REVERE LIFE INSURANCE COMPANY,
a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc.,
Defendants-Appellants.

No. 02-16501

Argued and Submitted Oct. 9, 2003.
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Before PREGERSON, BEAM,* and PAEZ, Circuit Judges.

MEMORANDUM**

Defendants, Paul Revere Life Insurance Company and its corporate affiliates (collectively, "Paul Revere"), appeal from the district court's judgment following a jury verdict in favor of Plaintiff Gary Greenberg's ("Greenberg") claim of bad faith termination of disability benefits. Paul Revere argues that the district court committed various evidentiary errors, misinterpreted the type of damages available under Arizona law, and allowed an impermissible award of punitive damages. We have jurisdiction under 28 U.S.C. § 1291 and affirm the judgment.

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

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I. The district court's evidentiary rulings.

Paul Revere contends that the district court committed reversible error when it (a) admitted the testimony of Greenberg's insurance industry expert, (b) excluded Paul Revere's expert testimony about Greenberg's demeanor during a deposition, and (c) excluded Paul Revere's evidence of Greenberg's website postings. We review evidentiary rulings for an abuse of discretion. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir.2002).

First, the district court did not abuse its discretion in admitting the testimony of Greenberg's industry expert, Donald Kelley. Contrary to Paul Revere's contention, the district court was not required to assess Kelley's testimony against the factors articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) — peer review, publication, error rates, etc. — where it was the "kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir.2000). Nor was the district court obliged to make an express reliability finding after Paul Revere explicitly waived its objection to Kelley's testimony about industry standards.[1]

Second, the district court properly barred Dr. Steven Pitt from testifying about his impressions of Greenberg's demeanor during a deposition because Paul Revere failed to disclose this additional testimony until the eve of trial.[2]

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[1] When the district court suggested allowing Kelly to testify about industry standards for claims handling but barring him from testifying about legal matters, Paul Revere responded, "Then we'll have no problem with the Court's order. *None of the objectional [sic] information will be elicited.*

[2] Paul Revere's attempt to categorize Dr. Pitt as a layperson runs afoul of a 2000 amendment to Federal Rule of Evidence 701, which "ensures that a party will not evade the expert witness disclosure requirements set

Moreover, Paul Revere is unpersuasive in invoking the "treating physician" exemption because Dr. Pitt's observations at the deposition were clearly outside of a "treatment" context.

Third, the district court properly excluded Paul Revere's evidence of Greenberg's website postings as irrelevant. In any event, Paul Revere waived its objection when it failed to later request an evidentiary hearing after earlier being invited to do so by the district court.

None of these evidentiary rulings constitute reversible error.

II. The availability of "future benefits" under Arizona tort law.

Paul Revere challenges the district court's decision to allow future benefits as part of an award for a bad faith termination of benefits under Arizona law. We review de novo a district court's interpretation of state law. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir.2002) (en banc).

Although the Arizona Supreme Court has not addressed this issue directly, the district court correctly noted that Arizona law contains a general presumption in favor of future damages. See *Wendelken v. Superior Court*, 137 Ariz. 455, 671 P.2d 896, 899 (1983) ("Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity."). Other states have found that an award of future damages is consistent with the general tort requirement of "direct and proximate" causation where there is evidence that (1) the insured will

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forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson." Fed.R.Evid. 701 advisory committee's notes.

continue to be "entitled" to disability benefits,[3] and (2) the insurer will continue to deny those benefits.[4] Thus, were the Arizona Supreme Court to address this issue, it would likely hold that future policy benefits may be awarded as compensatory damages.

Here, Greenberg presented considerable evidence that his condition was likely permanent and would qualify him for disability benefits into the future. The record also suggests that the jury believed that Paul Revere had irrevocably strained its relationship with Greenberg and had basically repudiated the contract.[5] In light of all the evidence and the availability of future policy benefits under Arizona law, the district court did not err in allowing the jury to include such benefits as part of its award of compensatory damages.

III. Availability of punitive damages.

We review Paul Revere's challenge to the sufficiency of evidence supporting the punitive damages award under the "substantial evidence" standard. See *Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir.2002). Here, Greenberg proffered ample evidence that Paul Revere acted with the "evil mind" necessary to support a punitive award under

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[3] See, *e.g.*, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, 149 n. 7 (1979) (en banc) (allowing future policy benefits as part of compensatory damages if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated).

[4] See *e.g.*, *DeChant v. Monarch Life Ins. Co.*, 204 Wis.2d 137, 554 N.W.2d 225, 229 (Ct.App.1996) (holding that future benefits are available upon a finding of bad faith because "repudiation is a legal conclusion which the trial court reaches after the fact finder makes its determinations about whether there was a breach and whether the breach was in bad faith").

[5] The jury's decision to award future damages to Greenberg rather than allow Paul Revere to reinstate the policy suggests that the jury believed that Paul Revere would find another way to deny benefits to Greenberg.

Arizona law. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 679-80 (1986).

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The evidence of Paul Revere's repeated conduct, which included acts of deceit, towards a financially vulnerable plaintiff was sufficient to allow the jury to find such behavior reprehensible. See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003); *BMW*, 116 S.Ct. at 1599, 116 S.Ct. 1589. The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in BMW and well within the "single digit ratio" that marks the outer limits of permissible disparities. *State Farm*, 123 S.Ct. at 1524. Considering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere, we conclude that the $2.4 million punitive award was not unconstitutionally excessive.[6]

AFFIRMED.

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[6] The district court also found that the punitive award in this case was within the range of other jury verdicts in similar bad faith cases in Arizona.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GARY GREENBERG, *Plaintiff*,

vs.

THE PAUL REVERE LIFE INSURANCE CO., ET AL., *Defendants*.

No. CV99-0154-PHX-SRB

Filed June 26, 2002

ORDER

Defendants filed a Motion for Judgment as a Matter of Law, for a New Trial and/or Remittitur and, in the Alternative, Motion to Amend Judgment on January 24, 2002. The Motion For Judgment as a Matter of Law asserts that the evidence was insufficient to support the jury's verdict on bad faith, that the Court erred in allowing future benefits to be awarded by the jury, that the Court erred in allowing the case to proceed against UNUMProvident, and that the evidence was insufficient to support the punitive damage award.

Although Defendants had asserted that the evidence was insufficient to support the jury's verdict in Plaintiffs favor on bad faith, the argument appears to have been abandoned in the Memorandum of Points and Authorities filed March 15, 2002. No argument was presented nor were authorities cited on this issue. In the memorandum of point and authorities, Defendants confine their arguments to their assertion that it was legal error to allow for the award of future benefits, to permit the case to proceed against UNUMProvident and to submit the punitive damage claim to the jury.

Plaintiff elected to proceed to trial only on the tort of bad faith and dismissed his claim for breach of contract. Recoverable damages for breach of contract would include only

damages to the time of trial and future benefits would not be awardable. While there is no Arizona case directly on point in the context of a bad faith claim for termination of disability benefits, future lost wages, future medical expenses, future pain and suffering, if proved, are part of the general damages awarded in tort. See Recommended Arizona jury Instruction (Civil) Personal Injury Damages I. The Court sees no reason why the Arizona Supreme Court would not extend this general rule of damages to the recovery of future disability benefits in a case such as this where the evidence supports the jury's finding that Plaintiff's disability from his occupation of stockbroker was a permanent one and that he would never be able to return to that occupation. This Court is persuaded that the Arizona Supreme Court would adopt the rational adopted by the California Supreme Court in *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, (1979) wherein the court held that future policy benefits were recoverable as part of the jury's compensatory damage award if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated by the insurer.

Defendants have presented nothing new to the Court on the issue of UNUMProvident's liability for bad faith. Their Motion for Judgment as a Matter of Law makes the same arguments previously made and rejected by the Court when it permitted the jury to consider the liability of UNUMProvident, even though the contract was between Paul Revere and Plaintiff. The corporate changes subsequent to the issuance of the policy resulted in UNUMProvident employees assuming the claims handling function for Paul Revere. It was undisputed that UNUMProvident employees made the decision to initiate the investigation of the claim, retained the medical experts to evaluate the disability, determined what information to provide to the medical experts, and ultimately made the decision to terminate policy benefits. The evidence demonstrated that Paul Revere had no claims handling function

after the acquisition of Paul Revere and that all decisions made in good faith or bad were made by UNUMProvident. Even Plaintiff's termination of benefits letter was sent on UNUMProvident letterhead. Defendants have presented nothing that would alter this Court's view that UNUMProvident could be found liable for bad faith and the jury properly considered the bad faith claim against it.

On the punitive damage award, Defendants make several arguments, including that the punitive award was not supported by substantial evidence. The Court disagrees. Plaintiff presented evidence which, if believed, demonstrated that the UNUMProvident employees acted to serve their own interests and conscientiously disregarded a substantial risk of significant harm to the Plaintiff. The jury may have concluded that sending the Goldfarb statement to the independent medical examiner was sent to prejudice the opinion and to create a basis upon which a diagnosis of malingering would be made. The evidence showed that not all of the information UNUMProvident had about Goldfarb was communicated to the medical examiner which the jury may have found was done with the intent to cause Plaintiff injury. The Court finds that the punitive award was supported by substantial evidence.

Defendants raised 22 grounds for new trial in the motion filed January 24, 2002. The actual Memorandum of Points and Authorities asserts only several. In the March 15, 2002 Memorandum of Points and Authorities Defendant seek a new trial on the grounds that the great weight of the evidence does not support the jury's finding of bad faith, the great weight of the evidence does not support the jury's finding of punitive damages, the Court erred in permitting Donald Kelly to testify as an expert, the Court erred in refusing to allow the jury to award anything but past benefits, the Court erred in refusing to allow Dr. Pitt to testify about his observations of Mr. Greenberg's on-going disability at the time of Dr. Pitt's deposition taken by Mr. Greenberg and the punitive award is both excessive and violative of due process.

A new trial may be granted if the Court determines that the verdict is against the great weight of the evidence or finds that the jury has reached a seriously erroneous result. *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987); *Digidyne Corp. v. Data General Co.*, 734 F.2d 1336, 1347 (9th Cir. 1984). A verdict supported by substantial evidence may still be set aside and a new trial granted when the Court determines that it is contrary to the clear weight of the evidence and necessary to prevent a miscarriage of justice. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). The Court sits as the 13th juror, weighs the evidence and assesses the credibility of witnesses. The Court need not view the evidence from the perspective most favorable to the prevailing party. *Landis Construction Company, Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). In *Landis Construction*, the Ninth Circuit cited with approval the test suggested by Wright and Miller,

It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered. Necessarily all formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with a definite and firm conviction that a mistake has been committed, it is to be expected that he will

grant a new trial. 11 Wright, Miller and Kane, Federal Practice and Procedure: Civil 2nd Section 2806 at p. 74-75 (1995).

This Court having considered and weighed the evidence and having given full respect to the jury's finding is not left with a definite and firm conviction that a mistake has been made or that a miscarriage of justice has resulted. This case did not involve complex issues difficult for the jury to understand. Instead, it involved much conflicting evidence and many credibility determinations. Resolution of such conflicts and credibility issues are best suited for jury determination. The jury in this case resolved the credibility issues and the numerous conflicts in the testimony in favor of the Plaintiff's claim that his benefits were terminated in bad faith rather than in favor of the Defendant's claim that he was no longer disabled but was deliberately malingering. This Court cannot say that the verdict was against the great weight of the evidence and is not of the view that the jury's finding is a miscarriage of justice.

On this Motion for New Trial Defendants have presented nothing new to cause this Court to reconsider its ruling in limine allowing Don Kelly to testify as an expert and a new trial will not be granted on this basis.

Defendants argue that the gravamen of Plaintiff's action was claims handling not the decision to terminate benefits and therefore the Court's direction to the jury that if it found in favor of Plaintiff it must award the policy benefits from the date of termination to present and all premiums paid from November 19, 1998 to present was error as a matter of law. Defendants suggest that the jury could have found Defendants liable in tort and limited damages only to emotional distress. In response, Plaintiff points out that the instruction given to the jury in this case only permitted the jury to find bad faith if Defendants intentionally denied or terminated benefits without a reasonable basis. No general bad faith

claim for claims handling was presented for the jury's consideration.

This case was about benefit termination. Defendants' counsel's conceded: "the issue is simply whether or not we properly terminated them (the benefits)." Counsel also responded "yes" to the Court's question "So you're going to concede, and I can instruct the jury at the time of the damages, that the defense concedes that in the event they determine that the benefits were terminated in bad faith that benefits are due at least through the date of their verdict?" (Trial Transcript Vol. 5 p. 45-46). Defendants' Motion for New Trial on this ground is clearly meritless.

The final claimed legal error is the Court's refusing to allow Dr. Pitt to testify concerning his observations of Plaintiff while Plaintiff deposed Dr. Pitt. Defendants argue that because Plaintiff's present treating physician was allowed to testify concerning his present and future mental disability that Dr. Pitt should have been permitted to opine about his observation that Mr. Greenberg did not seem to be suffering from a mental disability at the time Dr. Pitt's deposition was taken. The Court precluded this testimony because of lack of disclosure. Defendants assert that no disclosure was required and Dr. Pitt should have been permitted to testify about his observations of the Plaintiff while Dr. Pitt was being deposed.

Plaintiff responds by noting the requirement for disclosure and the sanction of preclusion if disclosure is not made. The Court ruled "Since Dr. Pitt has never been disclosed as someone that would say anything about Mr. Greenberg's disability or lack of a disability after the date that he authored his report, he will not be allowed to say so at trial. You obviously could have after the deposition concluded supplemented disclosure and said, oh and now we are going to offer Dr. Pitt to say not only did he think he was fine way back when, but I can tell now based on the fact that he conducted

the deposition that he's just as fine now." November 7, 2001 transcript page 19. This Court continues in its opinion that Federal Rule 26 required disclosure if Dr. Pitt was going to opine about Plaintiff's disability on any date subsequent to the date he authored his report and Federal Rule 37 authorizes preclusion of this undisclosed evidence at trial.

The final basis upon which a new trial is sought concerns the claim that the amount of punitive damages was excessive and violative of due process. The standard to evaluate punitive damages is different when the Court is determining whether punitive damages are excessive under state law or violate the federal due process clause. On the state law claim of excessiveness the Court applies the following criteria: the proportionality of the award to the wrongdoer's financial position to ensure that the goals of punishment and deterrence are served without financially devastating the Defendants; the reprehensibility of the Defendants' conduct including its duration, and Defendants' awareness of the risk of harm and any concealment; and the profitability to the Defendant of the wrongful conduct. *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1080-1085 (Ariz. 1987), *Hyatt Regency Phoenix Hotel Company v. Winston and Strawn*, 907 P.2d 506, 520 (App. 1995).

The jury awarded punitive damages of $2.4 million. The evidence showed that UNUMProvident's annual net income after taxes was $564.2 million and that UNUMProvident had a net worth of $5.575 billion. $2.4 million represented approximately one day of after-tax income for UNUMProvident. The amount awarded was not financially devastating to the Defendant and the Court cannot say that it was disproportionate to awards made in Arizona in bad faith cases. Defendants' conduct when viewed in a light most favorable to upholding the award was reprehensible. Defendants knew of the risk of harm to the Plaintiff. A disability policy by its very nature is income replacement and the loss of disability benefits could clearly have a devastating financial impact to

the Plaintiff and his family. The jury had evidence that Defendants provided selective information to its medical examiner withholding favorable information as it related to the Goldfarb statement, and the Defendants ignored their own employee's recommendations with regard to further investigation of the truth of the Goldfarb statement. After termination, while suggesting that Plaintiff and his physician could present additional evidence of disability, Defendants refused to provide the Goldfarb statement so that it could be addressed. Finally, there was profitability to Defendants' wrongful conduct by terminating benefits. Defendants saved hundred of thousands of dollars in benefits past due and due in the future to Plaintiff. The award is not excessive under Arizona law.

This Court is required to review punitive damage awards for compliance with constitutional due process. The Supreme Court has set out three guideposts the Court must evaluate against the punitive award. They are 1) the degree of reprehensibility of the Defendants' misconduct; 2) the disparity between the harm (or potential harm) suffered by the Plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001); *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). Applying these three guideposts the Court cannot say that this award of $2.4 million violates due process. As detailed previously, Defendants' conduct was reprehensibile. The harm to Plaintiff was not purely economic in nature and deceit could have been found by the jury based on the information selectively disclosed to and withheld from Dr. Pitt.

The ratio of approximately 4:1 is clearly within the constitutional range. At Defendants' request, the jury was instructed that any punitive award must have a rational relationship between the amount of harm caused by the De-

fendants and the punitive award. There is no evidence that the jury was influenced by passion or prejudice but awarded a reasonable amount for punitive damages in relation to the compensatory award.

The third guidepost asks the Court to compare the punitive award to the possible civil or criminal penalty that could be imposed. While there is no direct comparable penalty and Defendants look to the $5,000 maximum fine that could be imposed, Plaintiff points out that suspension or revocations of an insurer's license is a possible penalty for improper claims handling. A.R.S. § 20-220(A)(4) permits revocation of an insurer's certificate of authority to do business in Arizona if it "usually compels claimants under its policies to accept less than the amount due them or to bring suit against them to secure full payment thereof" in addition to the $5,000.00 civil penalty for the violation of A.R.S. § 20-220 (B)(1). The verdict does not violate due process.

Defendants' final motion is a Motion to Amend the Judgment to reflect that the award of future damages satisfies Defendants' obligation to pay disability benefits to Plaintiff under the policy. Plaintiff bas no objection. This motion will be granted.

IT IS ORDERED denying Defendant's Motion for Judgment as a Matter of Law. (Doc. 246-1).

IT IS FURTHER ORDERED denying Defendants' Motion for New Trial and/or Remittitur. (Doc. 246-2).

IT IS FURTHER ORDERED granting Defendants' Motion to Amend Judgment. The award of future damages by the jury satisfies Defendants' obligations to pay disability benefits to Plaintiff under the policy. (Doc. 246.3).

DATED this 25th day of June, 2002.

/s/ SUSAN R. BOLTON

Susan R. Bolton
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY GREENBERG, husband,
Plaintiff-Appellee

v.

PAUL REVERE LIFE INSURANCE COMPANY, a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc.,
Defendants-Appellants.

No. 02-16501

Filed March 4, 2004

ORDER

Before: PREGERSON, BEAM,* and PAEZ, Circuit Judges.

The memorandum disposition filed on January 12, 2004, is hereby AMENDED as follows:

1. On page 3, the following sentence is deleted: "Nor was the district court obliged to make an express reliability finding after Paul Revere explicitly waived its objection to Kelley's testimony about industry standards." Footnote 1 is also deleted.

2. In their place on page 3, the following new sentences are added: "Even assuming that the district court erred in allowing Kelley to testify, we cannot reverse absent some showing of prejudice. See *Janes*, 279 F.3d at 886. Here, Paul Revere was not prejudiced because much of Kelley's testimony about the indus-

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

try standards for the proper handling of disability claims was corroborated by one of Paul Revere's lead claim examiners on the witness stand. Thus, the decision to admit Kelley's testimony ultimately was not prejudicial."

With these amendments, the petition for rehearing and for rehearing en banc is DENIED. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(f).

Supreme Court, U.S.
FILED
JUN 9 - 2004
OFFICE OF THE CLERK

No. 03-1606

In the Supreme Court of the United States

PAUL REVERE LIFE INS. CO. AND UNUMPROVIDENT CORP.,

Petitioners,

v.

GARY GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners filed their petition for certiorari on June 1, 2004, seeking review of the Ninth Circuit's decision affirming a $2.4 million punitive award. The petition asserts that the Ninth Circuit misapplied each of the three excessiveness guideposts articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and clarified in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). More broadly, it contends that the lower courts routinely have been misapplying *State Farm* and cites as one of several illustrations the Utah Supreme Court's recent decision in the *State Farm* remand. *See* Pet. 17 (discussing *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188 (Utah Apr. 23, 2004)).

On June 2, respondent waived his right to file an opposition to the petition. The docket indicates that the Court is scheduled to consider the petition at its June 24, 2004, conference.

Petitioners have recently learned that State Farm intends to file a petition for certiorari, contending that the Utah Supreme Court's decision on remand misapplies this Court's decision in *State Farm*. That petition is due on July 22, 2004 — *i.e.*, after the date of the conference for the present petition.

We submit that there is a substantial possibility that this Court will agree with State Farm and issue an opinion summarily reversing the Utah Supreme Court. That opinion could well provide additional guidance regarding proper application of the Court's original decision in *State Farm*. If so, such an opinion would likely compel the conclusion that the $2.4 million punitive award against petitioners here is unconstitutionally excessive.

Accordingly, we respectfully suggest that the Court hold the petition and dispose of it in tandem with the petition that State Farm is expected to file on or before July 22, 2004.

Respectfully submitted.

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JUNE 2004